

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DOUGLAS RICHEY, on behalf of himself
and all other similarly situated,

Plaintiff,

v.

AXON ENTERPRISES, INC., formerly
d/b/a TASER INTERNATIONAL, INC.

Defendant.

3:19-cv-00192-MMD-CLB

ORDER

Before the court is the motion of defendant Axon Enterprises, Inc. ("Defendant") to stay discovery pending the Court's ruling on Defendant's motion to strike. (ECF No. 64). Plaintiff responded, (ECF No. 65.), and Defendant replied. (ECF No. 72). The court has reviewed the relevant pleadings and papers, and, for the reasons set forth below, the court grants the motion, in part, and denies, the motion, in part.

I. BACKGROUND

This case concerns the alleged defect of Defendant's model "C2" consumer CEW¹ for personal self-defense that discharged while in the Plaintiff's pocket. (ECF No. 70). Plaintiff contacted Defendant's customer service representative to inquire about the problem. (*Id.* at 8). The representative explained that the engineers are currently aware of the safety switch active activation issue and are working on a solution. (*Id.*). On February 14, 2020, Plaintiff filed their First Amended Complaint ("FAC"). (ECF No. 54). On April 14, 2020, Defendant filed the motion to strike certain allegations contained in the FAC. (ECF No. 61). Defendant also filed a motion for a limited stay of discovery to stay any discovery

¹ Conducted Electrical Weapon from TASER

1 from proceeding on those allegations Defendant's had moved to strike, which Plaintiffs
2 opposed. (ECF Nos. 64, 65).

3 After these motions were filed, the parties stipulated to Plaintiff filing a Second
4 Amended Complaint ("SAC"), which was granted. (ECF Nos. 68, 69). The SAC removed
5 some, but not all, of the allegations Defendant had moved to strike from the FAC. Ultimately,
6 Plaintiff then filed the SAC on May 27, 2020. (ECF No. 70). At this point, the only operative
7 pleading in the case was the SAC – not the FAC. In spite of this, Defendants did not withdraw
8 the motion to strike aspects of the FAC, or the motion to stay. Rather, the parties simply
9 continued with briefing on both motions -- shifting to only those allegations in the SAC the
10 parties disputed. Proceeding in this way has placed the court in the position of attempting
11 to discern what aspects of the SAC Defendant is seeking to strike and, significant to this
12 order, what aspects of discovery Defendant now seeks to stay.

13 **II. DISCUSSION**

14 Based on the court's review of the SAC and the various filings related to the motions
15 to strike and stay, it is the court's interpretation that Defendant seeks to only stay one limited
16 aspect of discovery related to Defendant's sales of law enforcement models to state, federal
17 and local agencies. (See ECF No. 76 at 2) (Defendant's reply in support of motion to strike
18 asserting there is only "one" remaining issue for the court to decide relative to the motion to
19 strike: whether Richey is legally barred from represented state, federal, and local law
20 enforcement agencies.)

21 Courts have broad discretionary power to control discovery, including the decision to
22 allow or deny discovery. See *e.g.*, *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988).
23 Under the Federal Rules of Civil Procedure, the court may stay or limit the scope of
24 discovery upon a showing of good cause by the moving party. Fed. R. Civ. P. 26(c). Meeting
25 the "good cause" requirement is no easy task. The party seeking the stay must make a
26 "strong showing" as to why discovery should be denied; broad statements about
27 inconvenience, cost, or a need for protection are insufficient. *Blankenship v. Hearst Corp.*,

1 519 F.2d 418, 429 (9th Cir. 1975); *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*,
2 288 F.R.D. 500, 503 (D. Nev. 2013).

3 To determine if a stay of discovery is appropriate, the court considers the following
4 factors: (1) whether the pending motion is potentially dispositive of the case; (2) whether the
5 motion can be decided without additional discovery; and, (3) whether the court is convinced
6 that the plaintiff cannot state a claim for relief. *Kor Media Group, LLC v. Green*, 294 F.R.D.
7 579, 581 (D. Nev. 2013); *First Am. Title Ins. Co. v. Commerce Assocs., LLC*, No. 2:15-cv-
8 832-RFB-VCF, 2015 WL 7188387, at *2 (D. Nev. Nov. 13, 2015). In order to determine
9 whether the plaintiff can state a claim, the court must take a “preliminary peek” at the merits
10 of the underlying dispositive motion – in this case the motion to strike. *Tradebay, LLC v.*
11 *eBay, Inc.*, 278 F.R.D. 597, 602-03 (D. Nev. 2011). The “preliminary peek” does not
12 prejudice the outcome of the motion; it merely evaluates whether an order staying discovery
13 is warranted. *Id.* at 603. In doing so, the court considers the goal of Federal Rule of Civil
14 Procedure 1, which provides that the Rules should “be construed, administered, and
15 employed by the court and the parties to secure the just, speedy, and inexpensive
16 determination of every action.” With Rule 1 as its prime directive, the court must decide
17 whether it is more just to speed the parties along in discovery while a dispositive motion is
18 pending or to delay discovery to accomplish the inexpensive determination of the case. See
19 *Turner Broadcasting System, Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev. 1997);
20 see also *Twin City Fire Ins. v. Employers Insurance of Wausau*, 124 F.R.D. 652, 653 (D.
21 Nev. 1989).

22 In this instance, the parties appear to agree that the motion to strike would be
23 dispositive as to the issues Defendant seeks to strike from the SAC and discovery is not
24 needed to decide the motion to stay. Therefore, the court will focus on the last – i.e., whether
25 the court is convinced that the motion to strike is meritorious and whether a limited stay of
26 discovery is appropriate.

1 Defendant moves the court to enter a limited stay of discovery related to its sales of
2 law enforcement models to federal, state, and local law enforcement agencies. Defendant
3 asserts Plaintiff cannot represent federal, state, and local law enforcement agencies in this
4 class action. (ECF No. 64 at 13). However, after reviewing the filings related to the motion
5 to strike and conducting independent research, it appears that this exact issue has not been
6 addressed by the Ninth Circuit. In fact, it appears to be a jurisdictional split related to
7 whether federal, state, or local agencies can be included in a class action lawsuit as
8 plaintiffs. For example, *In re Flonase Antitrust Litigation*, the Eastern District of
9 Pennsylvania allowed class certification which permitted the United States government and
10 certain state governments and their agencies to be included as class members to the extent
11 they purchased fluticasone for their employees. No. 08-3301, 2015 WL 9273274, at *1 (E.D.
12 Penn. 2015); *see also* *S. States Police Benevolent Ass'n v. First Choice Armor & Equip.*,
13 241 F.R.D. 85, 93 (D. Mass. 2007) (stating courts may certify state agencies as part of a
14 class action so long as there is an opportunity to opt out of the class); *In re Lupron Mktg. &*
15 *Sales Practices Litig.*, 228 F.R.D. 75 (D. Mass 2005) (certifying a class of all persons or
16 entities who paid for Lupron during a period from January 1, 1991, through September 30,
2001).

17 However, *In re McKesson Governmental Entities Average Wholesale Price*
18 *Litigation*, the court did not allow federal or state entities to be certified as plaintiffs in the
19 class action. 767 F. Supp. 2d 263, 266 (D Mass. 2011); *see also* *Walker v. Liggett Grp.,*
20 *Inc.*, 982 F. Supp. 1208, 1210-11 (S.D. W. Va. 1997) (stating that no person or entity other
21 than the Attorney General of that state is authorized to represent that state). Therefore,
22 federal, state, and local agencies have, in some jurisdictions, been included in class actions
23 as a plaintiff.

24 Moreover, Defendant argues in the motion to strike that the Eleventh Amendment
25 “generally bars federal court jurisdiction over the States and their Agencies.” (ECF No. 61
26 at 23). While this is true, the Eleventh Amendment has generally been interpreted as
27 protection for States from suits brought by citizens in federal court. *Douglas v. Cal. Dep’t of*

1 *Youth Auth.*, 271 F.3d 812, 817 (9th Cir. 2001) (quoting *Hans v. Louisiana*, 134 U.S. 1,15
2 (1890)); see also *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007)
3 (stating that Eleventh Amendment immunity is an affirmative *defense*) (emphasis added);
4 *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 834 (9th Cir. 2000) (stating that the
5 Eleventh Amendment grants the State a legal power to assert a sovereign immunity
6 *defense*) (emphasis added). In other words, the Eleventh Amendment is generally used
7 as a defense from suit – not as a bar to bring suit. However, the court was unable to locate
8 any binding case law holding that the Eleventh Amendment precludes states from being
9 plaintiffs in a class action or that states that the Eleventh Amendment cannot be applied in
10 this manner.

11 This motion to stay creates a difficult situation. The undersigned is not entirely
12 convinced that Defendant's motion to strike will be granted. However, it does appear that
13 the issues presented by the motion to strike are novel and present a variety of issues that
14 appear to be legally unsettled. Moreover, how the undersigned sees the issues presented
15 by the motion to strike may be very different from how the assigned district judge will see
16 these same issues. Ultimately, it is the assigned district judge who will make the ultimate
17 determination on whether the issues related to whether Plaintiff can represent state, federal
18 and local law enforcement agencies in this case. Although the undersigned may not be
19 entirely convinced that the motion to strike will be granted, the court must also consider
20 whether, as a general matter, granting a limited stay is nonetheless appropriate under the
21 circumstances. In this case, after considering all of the facts and circumstances related to
22 the limited request for a stay, the court finds it is more prudent to grant the requested stay,
23 which appears to limited to a fairly isolated issue until the assigned district judge makes a
24 determination of the merits of Defendant's motion to strike.

25 Therefore, the court will grant a limited stay of discovery requested by Defendant at
26 this time. However, this stay does not apply to any other aspects of discovery, including
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1 discovery related to the sales of law enforcement models to individual consumers – whether
2 those consumers are members of law enforcement or not.

3 **III. CONCLUSION**

4 Accordingly, the motion for stay pending ruling on the motion to strike (ECF No. 64)
5 is **GRANTED in part** and **DENIED in part** as stated above.

6 **IT IS SO ORDERED.**

7 DATED: July 6, 2020.

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9 UNITED STATES MAGISTRATE JUDGE
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